

STATEMENT OF THE CASE

William Lee appeals his convictions for Dealing in Cocaine, as a Class A felony, and Possession of Cocaine, as a Class C felony, following a bench trial.¹ He presents the following issues for our review:

1. Whether the admission into evidence of a statement Lee made to a police officer while in custody was fundamental error.
2. Whether his convictions violate the Indiana Constitution's prohibition against double jeopardy.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On April 25, 2007, Indianapolis Police Officer Andrew Hannaford was on patrol in a “high-crime, high-narcotic” area in Indianapolis when he observed Lee driving a motorized scooter erratically. Transcript at 5. Officer Hannaford conducted a traffic stop. Lee could not present a driver's license, which is required to operate the type of scooter Lee was driving. Officer Hannaford determined that Lee's driver's license was suspended at that time. Accordingly, Officer Hannaford arrested Lee, and during a pat-down search of Lee's person, Officer Hannaford found two bindles of what was later determined to be cocaine. Officer Hannaford read Lee his Miranda rights.

Indianapolis Police Officer Julian Wilkerson arrived at the scene to assist Officer Hannaford. While Officer Hannaford was filling out paperwork, Officer Wilkerson asked Lee, who had presented a military I.D., “what was he out here doing[?]” Id. at 20.

¹ Lee does not appeal his conviction for Driving While License Suspended.

Lee replied that he had lost his job since he had left the military and that “he had been selling crack for about two days.” Id.

The State charged Lee with dealing in cocaine, as a Class A felony; possession of cocaine, as a Class C felony; and driving while license suspended, a Class A misdemeanor. Following a bench trial, the trial court found Lee guilty as charged. The trial court entered judgment of conviction on all counts and sentenced Lee to an aggregate sentence of twenty years.² This appeal ensued.

DISCUSSION AND DECISION

Issue One: Fundamental Error

Lee first contends that the trial court erred when it permitted Officer Wilkerson to testify that Lee stated that he had been “selling crack.” Transcript at 20. In particular, Lee maintains that there is no evidence that he voluntarily and intelligently waived his Miranda rights before making that statement to Officer Wilkerson, so his statement should have been excluded. But Lee did not make a contemporaneous objection to the statement based on Miranda at trial, so the issue is waived.

Acknowledging waiver, Lee contends that the admission of the statement constitutes fundamental error. The fundamental error exception is extremely narrow. Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008). Fundamental error is a substantial, blatant violation of basic principles rendering the trial unfair to the defendant and, thereby, depriving the defendant of fundamental due process. Carter v. State, 738 N.E.2d

² The trial court imposed concurrent sentences of twenty years for dealing and two years for possession.

665, 677 (Ind. 2000). The error must be so prejudicial to the rights of a defendant as to make a fair trial impossible. Id.

In Moran v. Burbine, 475 U.S. 412, 421 (1986), the United States Supreme Court set out the analysis to determine whether a defendant has waived his Miranda rights:

Echoing the standard first articulated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), Miranda holds that “[t]he defendant may waive effectuation” of the rights conveyed in the warnings “provided the waiver is made voluntarily, knowingly and intelligently.” 384 U.S. [436, 444 (1966)]. The inquiry has two distinct dimensions. Edwards v. Arizona, 451 U.S. [477, 482 (1981)]; Brewer v. Williams, 430 U.S. 387, 404 (1977). First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Fare v. Michael C., 442 U.S. 707, 725 (1979). See also North Carolina v. Butler, 441 U.S. 369, 374-75 (1979).

Here, Lee did not object to the admission of his statement on Miranda grounds. As a result, there is scant evidence showing the circumstances surrounding his statement.³ Indeed, the evidence shows merely that Officer Hannaford read Lee his Miranda rights upon his arrest, before Lee made the statement to Officer Wilkerson. On appeal, for the first time, Lee complains that neither officer made sure that he understood those rights before Officer Wilkerson started talking to him. But there is no indication, and Lee makes no suggestion, that Lee did not understand his Miranda rights or the consequences of waiver. Nor is there any suggestion that Lee was coerced into making the statement.

³ Had Lee made such an objection at trial, the State would have presumably questioned the officers in more detail regarding the circumstances surrounding the Miranda waiver. But because Lee did not challenge the voluntariness of his Miranda waiver at trial, the State had no reason to present such evidence, and the trial court made no ruling on the issue.

To the contrary, Officer Wilkerson asked Lee a rather vague question, and Lee responded with the incriminating statement. Lee has not demonstrated that the admission of his statement to Officer Wilkerson constituted fundamental error.

Issue Two: Double Jeopardy

Lee next contends that his convictions for dealing in cocaine and possession of cocaine were based on the same evidence and that, therefore, they violate the Indiana Constitution's prohibition against double jeopardy. Two offenses are the "same offense" in violation of the Indiana Double Jeopardy Clause if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Rutherford v. State, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007). Under the "actual evidence" test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Id. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish all of the essential elements of a second challenged offense. Id.

"[T]he 'proper inquiry' is not whether there is a reasonable probability that, in convicting the defendant of both charges, the [fact-finder] used different facts, but whether it is reasonably possible it used the same facts." Bradley v. State, 867 N.E.2d 1282, 1284 (Ind. 2007) (emphases original). Here, there is a reasonable possibility that

the trial court used the same cocaine to convict Lee of both dealing and possession of cocaine. Thus, double jeopardy is implicated. Indeed, the State concedes that “it is clear that [Lee] was found guilty twice of possession of the same cocaine.” Brief of Appellee at 8. “When two convictions contravene double jeopardy principles, we may vacate one of the convictions[.]” Bradley, 867 N.E.2d at 1285. Therefore, we remand to the trial court with instructions to vacate Lee’s conviction for possession of cocaine.⁴

Affirmed in part, reversed in part, and remanded.

MAY, J., and ROBB, J., concur.

⁴ Because the trial court imposed concurrent sentences and the longer sentence was imposed for dealing in cocaine, the vacation of Lee’s possession conviction does not affect his sentence.